

**IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

J. H. BERRA CONSTRUCTION CO., INC.)	
)	
Appellant,)	Appeal No. ED 84102
)	
vs.)	
)	
RANDY HOLMAN, ASSESSOR)	
)	
JEFFERSON COUNTY, MISSOURI)	
)	
Respondent)	

APPEAL FROM THE CIRCUIT COURT OF JEFFERSON COUNTY
TWENTY-THIRD JUDICIAL CIRCUIT
DIVISION III
HONORABLE M. EDWARD WILLIAMS

BRIEF OF APPELLANT

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POINT RELIED ON

I. The State Tax Commission erred in affirming the assessed valuation of Appellant’s construction equipment in Jefferson County because under Sections 138.470.4 and 536.140.2 RSMo., the Commission’s decision is not authorized by law or supported by competent and substantial evidence upon the whole record in that:

A. The construction equipment had only a temporary presence and was not regularly kept in Jefferson County and hence was not “situated” in Jefferson County on January 1, 2001, within the meaning of section 137.095 RSMo.

B. The Commission utilized an incorrect standard of requiring Appellant to prove that its construction equipment was “continuously and habitually employed” in another county rather than the correct standard of whether Appellant’s construction equipment was “situated” in Jefferson County within the meaning of Section 137.095 RSMo. by virtue of having a permanent presence in Jefferson County, which said permanent presence was not established by the evidence before the Commission. 12

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JURISDICTIONAL STATEMENT

This case involves an appeal of a judgment of the Jefferson County Circuit Court affirming the decision of the State Tax Commission that Appellant's construction equipment was subject to assessment of personal property taxes in Jefferson County.

The issue on appeal is whether Appellant's construction equipment was "situated" in Jefferson County on January 1, 2001, and had a taxable situs in Jefferson County pursuant to Section 137.095 RSMo. This appeal involves application of the term "situated" as it is used in Section 137.095 RSMo., to the evidence before the State Tax Commission and falls within this Court's general appellate jurisdiction, as set forth in Article V, § 3, of the Constitution of Missouri, in that it does not involve any issues over which the Supreme Court of Missouri has exclusive appellate jurisdiction.

STATEMENT OF FACTS

I. Procedural Background

A. Appeal to State Tax Commission

Appellant J. H. Berra Construction Co., Inc. filed its appeal to the State Tax Commission (“Commission”) of the decision of the Jefferson County Board of Equalization upholding the assessment of personal property taxes for 2001 on Appellant’s construction equipment made by Respondent Randy Holman, Assessor for Jefferson County, Missouri (I LF 31). In its *Order Clarifying Scope of Appeal and Amending Scheduling Order* dated July 9, 2002, (I LF 33) the Commission ruled:

“After consideration of the arguments raised, the Commission has determined that this appeal should be limited to a determination as to whether Complainant’s personal property which was physically located in Jefferson County on or about the relevant date was situated in Jefferson County for property tax purposes. We will not, in this appeal, adjudicate the adequacy of Complainant’s 2001 St. Louis County personal property return. The parties are advised to present factual evidence about the personal property that will inform this Commission in rendering a decision about where the property was legally “situated” on tax day and legal argument as to the meaning of “situated” as the term is used in Section 137.095, RSMo.”

Pursuant to the Commission’s Order, the parties pre-filed direct written testimony. Appellant (denominated as “Complainant” in the Commission’s proceedings) filed the direct testimony of its president, John H. Berra, Jr. (II LF 241). Respondent pre-filed the direct testimony of Michael J. Boynton, Director of Assessments for the Jefferson County Assessor’s Office (II LF 366). Both witnesses were present for cross-examination at the Hearing conducted by the Commission’s Hearing Officer on December 22, 2002. The transcript of the Hearing is at I LF 36.

The Commission's Chief Hearing Officer issued a Decision and Order which affirmed the assessment (II LF 375). Appellant filed its application for the full Commission's review of the Hearing Officer's Decision and Order (II LF 384). The Commission entered its Order affirming the Hearing Officer's Decision and Order on June 19, 2003. (II LF 390).¹

B. Jefferson County Circuit Court Petition for Judicial Review of the Decision

Appellant filed its petition for judicial review of the Decision with the Jefferson County Circuit Court on June 24, 2003. (I LF 3). The Commission filed its Certified Agency Record on July 18, 2003 (I LF 21). The parties stipulated that the case would be decided on the Certified Record of the Commission (I LF 22).

On December 19, 2002, the Honorable M. Edward Williams entered judgment on the petition of Appellant affirming the Decision of the Commission (I LF 23). Appellant filed its notice of appeal to this Court of the judgment on January 15, 2004 (I LF 24).

II. FACTUAL BACKGROUND

A. Complainant's Evidence

In response to the Commission's Order, Complainant, J.H. Berra Construction Co., Inc. ("Berra") filed its exhibits and the written direct testimony of its president, John H. Berra, Jr. Mr. Berra's direct testimony (Complainant's Exhibit O, II LF 241) addressed all aspects of the presence of Berra's construction equipment physically located on four construction job sites in Jefferson County for

¹ The Hearing Officer's Order and Decision and the Commission's Order Denying Application for Review of the Hearing Officer's Decision are collectively referred to in this brief as the "Decision."

the period spanning January 1, 2001. Mr. Berra's testimony may be fairly summarized as follows:

Nature and Location of Berra's Business

Berra is a Missouri corporation engaged in the business of heavy construction primarily consisting of construction of highways, sanitary and storm sewers, water mains and grading. The location of Berra's corporate offices is at 5091 New Baumgartner Road in St. Louis County, Missouri (II LF 242). The corporate headquarters at 5091 New Baumgartner Road was the registered office of J.H. Berra Construction Co., Inc. on January 1, 2001 (II LF 242-243). The facilities at 5091 New Baumgartner Road in St. Louis County consist of an office building, equipment maintenance shops, fuel depot, equipment and material storage yard and concrete plant. The building contains offices of Berra's corporate management, the accounting department and offices for construction project estimators, managers and field superintendents. All construction projects are estimated and bid for contract lettings and managed from the offices in this building. All labor and equipment are centrally dispatched to each project site as needed and all material for each site is ordered from the central offices. Also, contract invoicing and collection activities are conducted from this office. Berra employs a crew of mechanics who conduct maintenance and repairs of Berra's construction equipment within the maintenance shops. The shops maintain a large parts inventory and cranes for handling heavy lifting of equipment components. The equipment material storage yard is used for storage of construction equipment when not in use on a construction project and for storage of construction materials (II LF 243).

**Berra's Construction Equipment Physically Present
in Jefferson County on January 1, 2001**

Berra Exhibit B (I LF 86) is a list of Berra's construction equipment which was physically present on January 1, 2001, on four construction project sites in Jefferson County: Arrow Ridge, Romaine Bluffs, Seckman Lakes and Highway 21 Phase II (II LF 244). Berra performed work on these four projects under separate contracts (II LF 248). Exhibit B was prepared from Usage Detail Reports by Equipment for each of the four projects (II LF 244-246).² Exhibit G (I LF 152) is the Usage Detail Report for Arrow Ridge. Exhibit H (I LF 166) is the Usage Detail Report for Romaine Bluffs. Exhibit I (I LF 174) is the Usage Detail Report for Seckman Lakes. Exhibit J (II LF 180) is the Usage Detail Report for the Highway 21 project in Jefferson County. Exhibit J does not include reports for four pieces of equipment listed on Exhibit B as Berra Equipment Numbers 600, 601, 602 and 608. Numbers 600, 601 and 602 were on Rt. 67 in St. Francois County, then moved to Highway 21 in November, 2000. Number 608 was in Berra's yard at 5091 New Baumgartner Road and moved to Highway 21 in November 2000. These four pieces sat through the winter and began use in March, 2001. These four pieces could not be worked until roadbed preparation was finished to permit paving in March, 2001. In April, 2001, Number 600 was moved back to St. Francois County. Number 601 was moved to Interstate Drive in St. Charles County, and Numbers 602 and 608 were moved to Rt. 67, Madison County (II LF 245).

Berra's Exhibit M (II LF 234) is a summary of the equipment listed on the Usage Detail Reports indicating the days each piece was physically on each of the four Jefferson County project

²A detailed explanation of the method by which Exhibit B was prepared is set forth in I LF 244.

sites spanning January 1, 2001, and the days each piece worked during that span of time (II LF 247).

Berra's Goals as to Utilization and Movement of Equipment

The equipment listed in Exhibit B is moved from one location to another by highway tractor and flat bed trailer. The location at which the decisions are made as to where, when and how each piece of equipment listed in Exhibit B are to be used is at Berra's home office at 5091 New Baumgartner Road, St. Louis County, Missouri. The decisions are made by project managers and field superintendents with input from John Berra, Jr., taking into account that the nature of Berra's work is equipment intensive and necessarily involves assignment to each project of equipment needed to timely accomplish a given task on a particular project. To fulfill contractual obligations, maximize production efficiency and minimize costs, equipment is dispatched to a project only for the time necessary to accomplish its given task, after which it is moved to the next project or back to the storage yard at 5091 New Baumgartner Road. The cost of moving heavy equipment listed in Exhibit B is substantial and often requires dismantling together with overweight and oversize load permits. Therefore, Berra's goal is to minimize equipment movement only to the extent necessary to accomplish a given task on a particular project. To minimize equipment movement, equipment is sometimes parked on a particular site and not worked either because it is awaiting its work task or because of weather prohibitions, particularly in the winter months spanning January first. Because at any given time, including the time spanning and including January 1, 2001, the same equipment is needed on many projects in multiple counties, the equipment is moved to and kept on a project site only for the time needed to perform the task to which it was assigned. Berra's goal applies to the equipment listed in Exhibit B which was assigned to the four projects in Jefferson County only for the time needed for each piece to perform its assigned task

on each of those projects (II LF 248).

Highway 21 Project

Highway 21 involved construction of a 4.337 kilometer segment of new highway under contract with the Missouri Highway and Transportation Commission ("MHTC"). Exhibit C (I LF 87) is MHTC's Award of Contract and Notice to Proceed for the Highway 21 project dated May 5, 2000. Exhibit D (I LF 88) is the executed copy of the Contract between Berra and MHTC pertaining to the Highway 21 job. Exhibit E (I LF 95) is a copy of a portion of the Contract and Bond book between Berra and MHTC pertaining to the Highway 21 job. Berra's bid in response to the Notice to Contractors in Exhibit E was prepared and submitted by Berra to MHTC at Berra's home office at 5091 New Baumgartner Road, St. Louis County, Missouri. The contract was awarded and the Notice to Proceed was issued by MHTC in Jefferson City, Cole County, Missouri (II LF 250).

Exhibit F (I LF 136) is MHTC's Payment Estimate dated January 19, 2001, issued to Berra on the Highway 21 job covering pay period from 12/29/2000 to 01/15/2001. According to Exhibit F, the percentage of completion of the Highway 21 project as of January 15, 2001 was 14.62%. According to Page 1 of Exhibit F, 882 calendar days were allocated to perform this project. Berra commenced work on the Highway 21 Project on July 3, 2000. According to Exhibit F, the Adjusted Completion Date of the Highway 21 project was December 1, 2002 (I LF 137).

Berra subcontracted some of the work on the Highway 21 Project. The major subcontract portion was for the bridge work, and other subcontracts were let to satisfy the Disadvantaged Business Enterprise requirements on the project (II LF 250). Berra negotiated and entered into the subcontracts at its home office at 5091 New Baumgartner Road in St. Louis County. The

subcontractors' work was scheduled and coordinated and payments processed at the home office in St. Louis County. Supervision of their work was made in the field at the project site.

Berra was required by contract to furnish an office trailer on the Highway 21 project site for use by MHTC field inspectors while the job was in progress; otherwise, Berra maintained no office in Jefferson County. In order to build the new highway on the Highway 21 project, the roadbed must be excavated to grade, sewers and culverts installed, the bridge built and concrete pavement poured. Use of the equipment listed on Exhibit B while it was on the Highway 21 site consisted of the following: The hydraulic drills were used to blast rock for excavation of the roadway. The excavators, scrapers, compactors, hilifts and dozers were also used for excavation of the roadway. The paver, two placer spreaders and texture curing machine were used for concrete paving of the roadway (II LF 251).

Other Highway Projects in 2001

Berra was working on ten other highway construction projects in 2001 in addition to Highway 21 (II LF 251). Exhibit K (II LF 231) is a list of highway construction projects upon which Berra was working in 2001. Exhibit K indicates the county where the project was located, the contracting entity, contract price, time allotted for completion, and scope of work. Of these ten other highway projects, five were located in St. Charles County and the other five were located in the counties of Madison, Crawford, Carter, St. Francois and St. Louis. The work on these other projects listed in Exhibit K required the same type of equipment to perform the work described on the Highway 21 project, except paving equipment was not required for Rt. 60 in Carter County and Rt. 19 in Crawford County. Also, the two Sulphur Springs jobs in St. Louis County required asphalt paving which was subcontracted to an asphalt paving contractor (II LF 252).

Arrow Ridge, Romaine Bluffs and Seckman Lakes Projects

Arrow Ridge, Romaine Bluffs and Seckman Lakes involved installation of sanitary and storm sewers to serve private residential subdivisions under development. Arrow Ridge also included installation of water mains. Romaine Bluffs also included site grading. Exhibit L (II LF 232) is a list of other Berra sewer, grading and water main projects on which the equipment listed in the Usage Detail Reports was used. Exhibit L lists the county in which each project is located (II LF 252-253). Exhibit L indicates that the equipment listed in the Usage Detail Reports was used on 66 projects from November 30, 2000 through November 20, 2001. Of these 66 projects, 50 were located in St. Louis County, 11 in St. Charles County and 5 in Jefferson County (II LF 232).

B. Respondent's Evidence

Respondent pre-filed the direct testimony of Michael G. Boynton, Director of Assessments for the Jefferson County Assessor's Office (II LF 366). Mr. Boynton testified that he compiled the inventory that comprised Berra's taxable personal property as of January 1, 2001 (II LF 264), located in Jefferson County by field notes and photos from 2000 and 2001 visits to the various sites where Berra's machinery and equipment were located. Mr. Boynton testified that he has personally observed the constant presence of trucks, machinery and equipment owned by Berra on the Highway 21 project for the past couple of years (II LF 367). He further testified that over the past few years, he has traveled throughout the county and has observed many pieces of Berra's equipment at several locations at various times, including the period before and after January 1, 2001 (II LF 368). Mr. Boynton opined that the property of J.H. Berra Construction Co., Inc. listed in his appraisal was situated in Jefferson County as of January 1, 2001, because the presence of Berra's machinery and equipment

has become a permanent fixture at various locations throughout Jefferson County, especially at the long term projects, such as “M” Highway and the new Highway 21 (II LF 368).

In discussing Berra’s larger projects involving multi-year contracts, such as “M” Highway and Highway 21, Mr. Boynton acknowledged that once the project is completed, the workers and equipment will move to another location and set up to resume the same routine, and that depending on the progress of the project and the nature of the contract, equipment may be added or taken away from a site at various times (II LF 369).

On cross-examination, Mr. Boynton acknowledged that all of the equipment on his inventory of taxable personal property in Respondent’s Exhibit 2 was based upon observation of the equipment on construction job sites before and after January 1, 2001 (I LF 72); that he cannot state how long each item was on the job site listed in his inventory (I LF 72); that the equipment was brought to Jefferson County for no reason other than working on the job sites (I LF 79-80); that the equipment remained on the job sites only for the length of time it was needed to perform the job it was given (I LF 80); and that the time spent on a job site is variable, depending on the work for which the equipment was needed (I LF 80-81).

Mr. Boynton could not give a time line as to how long a specific piece of Berra’s equipment has to remain on a job, nor does his office have any standard, guideline, rule or policy to determine the length of time a specific piece of equipment must be on a job site before it becomes situated in Jefferson County (I LF 76-77).

POINT RELIED ON

I. The State Tax Commission erred in affirming the assessed valuation of

Appellant's construction equipment in Jefferson County because under Sections 138.470.4 and 536.140.2 RSMo., the Commission's decision is not authorized by law or supported by competent and substantial evidence upon the whole record in that:

A. The construction equipment had only a temporary presence and was not regularly kept in Jefferson County and hence was not "situated" in Jefferson County on January 1, 2001, within the meaning of Section 137.095 RSMo.

Buchanan County v. State Tax Commission, 407 S.W. 2d 910 (Mo. 1966).

Assessor of Sheffield v. J.F. White Contracting Co. 130 N.E.2d 696 (S. Ct. Mass, 1955)

George M. Brewster & Son, Inc. v. Borough of Bogota, 20 N.J. Super. 487, 90 A.2d 58 (1952)

Ace Construction Co. v. Board of Equalization of Douglas County, 98 N.W.2d 376 (S. Ct. Neb. 1959).

Section 137.095 RSMo.

B. The Commission utilized an incorrect standard of requiring Appellant to prove that its construction equipment was "continuously and habitually employed" in another county rather than the correct standard of whether Appellant's construction equipment was "situated" in Jefferson County within the meaning of Section 137.095 RSMo. by virtue of having a permanent presence in Jefferson County, which said permanent presence was not established by the evidence before the Commission.

Buchanan County v. State Tax Commission, 407 S.W. 2d 910 (Mo. 1966)

BiGo Markets, Inc. v. Morton, 843 S.W.2d 916 (Mo. 1992)

Beelman Truck Co. v. Ste. Genevieve County, 861 S.W.2d 557, 558 (Mo.banc 1993)

Section 137.095 RSMo.

ARGUMENT

Standard of Review

Section 138.430.1 RSMo grants every owner of tangible personal property the right to appeal from the local boards of equalization to the State Tax Commission concerning all questions and disputes involving the assessment against such property. Section 138.431 RSMo. provides for hearing officers to hear and decide appeals to the Commission. Section 138.432 RSMo. permits a complainant to file an application with the Commission an application to have the decision and order of a hearing officer reviewed by the Commission; and if denied, the decision and order of the hearing officer shall be deemed to be the final decision of the Commission and shall be subject to judicial review in the manner provided by Section 138.470.4 RSMo., which in turn provides that judicial review shall be in the manner provided in Sections 536.100 to 536.140 RSMo. Section 536.140.2 RSMo. provides that the scope of judicial review includes an inquiry of whether the agency's action is unsupported by competent and substantial evidence upon the whole record or is unauthorized by law.

This Court reviews only the findings and decision of the administrative agency, not the judgment of the circuit court. Hence, the circuit court's error, if any, is not relevant to this Court's review. Morton v. Brenner, 842 S.W.2d 538, 540 (Mo. banc 1992). The issue in this appeal involves the State Tax Commission's interpretation of the word "situated" in §137.095. As such, the issue is purely a question of law. It is well-settled that "Administrative agency decisions based on the agency's interpretation of law are matters for the independent judgment of the reviewing court." Id. at 540. The Supreme Court has further instructed that reweighing of

the evidence is applicable to cases in which the appellant challenges the construction of law or legal standard applied to it by an administrative agency. It allows the reviewing court to resolve factual issues where it has been successfully urged by appellant that the legal standard applied by the agency was incorrect. Evangelical Retirement Homes of Greater St. Louis, Inc. v. State Tax Commission, 669 S.W.2d 548, 553 (Mo.banc 1984). Inasmuch as the issue in this case involves statutory interpretation of situs, and not valuation of Appellant's construction equipment, which is purely a matter of law within the independent jurisdiction of this Court to determine, this Court may readily reverse the Commission's Decision and Order.

I. The State Tax Commission erred in affirming the assessed valuation of Appellant's construction equipment in Jefferson County because under Sections 138.470.4 and 536.140.2 RSMo., the Commission's decision is not authorized by law or supported by competent and substantial evidence upon the whole record in that:

A. The construction equipment had only a temporary presence and was not regularly kept in Jefferson County and hence was not "situated" in Jefferson County on January 1, 2001, within the meaning of section 137.095 RSMo.

The evidence establishes that Berra is a regional heavy construction contractor with its corporate office, maintenance shop and equipment storage yard in St. Louis County that at any given time has its equipment on job sites in multiple counties. The equipment is moved from job to job (and often from county to county) as it is needed to perform a particular task on the job to which it is delivered. Thus, on January 1, 2001, some of Berra's equipment consisting of the pieces listed in Exhibit B (I LF 86) happened to be on four job sites in Jefferson County.

It is noteworthy that the equipment listed on Berra Exhibit B does not necessarily coincide with the equipment listed in Mr. Boynton's inventory (II LF 264) which was the basis for Jefferson County's assessment of personal property taxes for 2001. The reason for the difference is that Berra's list includes only its equipment in Jefferson County spanning January 1, 2001; whereas the Assessor's list was compiled from site visits in 2000 and 2001.

Section 137.095 provides that tangible personal property of corporations operating in the State of Missouri shall be assessed and taxed in the county in which the property is situated on the first day of January. The Missouri Supreme Court held in Buchanan County v. State Tax Commission, 407 S.W. 2d 910 (Mo. 1966) that the provision in Section 137.095 that tangible personal property "shall be taxable in the county in which such property may be situated" on a stated day is not the same as providing that the property shall be taxable where "physically present" on that day. *Id.* 914. In its application to personal property, the word "situated" as used in a statute authorizing or directing the taxation of property, connotes a more or less permanent location or situs; that the word "situated" has been held to require more than a mere temporary presence, and that temporary presence is not sufficient. *Id.* 914. The Court held that whether the property was taxable in Buchanan County under Section 137.095 depended upon whether on January 1, the property was regularly kept there, that is, whether the permanent situs or location of the property was in Buchanan County, which is a fact issue to be decided by the Commission on remand. *Id.* 914.

Buchanan County cites Assessor of Sheffield v. J.F. White Contracting Co. 130 N.E.2d 696 (S. Ct. Mass, 1955) in which a town sought to assess machinery brought into the

town for use in construction of a bridge under a statute authorizing assessment of a tax on machinery “where such machinery ... is situated to the owner or any person having possession of same on January first.” Wherever the use of any of the machinery was required, the particular piece was brought into the town, put into operation on the job and when the operation was completed, it was removed. The court noted the general principle of property taxation that personal property is taxable at the domicile of the owner unless it has acquired a permanent situs in some other taxing jurisdiction. *Id.* 699. The court held that the machinery was not situated, and hence not taxable by the town because property cannot be said to be situated in a place merely because it is temporarily in use there on the tax day. To have a situs or to be situated implies “some degree of permanence of location” and “temporary lodgment or migratory presence ... is not enough.” *Id.* 698.

In George M. Brewster & Son, Inc. v. Borough of Bogota, 20 N.J. Super. 487, 90 A.2d at 58 (1952) the plaintiff was a large public works contractor having its principal executive and registered offices, plant, main repair shops, garage, and facilities for storing its equipment and machinery in the Borough of Bogota, Bergen County, New Jersey. The New Jersey Turnpike Authority awarded three contracts to plaintiff for construction of section 3 of the Turnpike, extending from Monmouth County to Gloucester County, a distance of 21.7 miles. Part of section 3 ran through the Townships of Westampton and Mount Laurel, Burlington County.

The equipment necessary to carry out the Turnpike work was forwarded to the job site and the work began in May, 1950. It was stipulated that the equipment assessed by the

Townships of Westampton and Mount Laurel on October 1, 1950, was physically located there for the purpose of being used on the Turnpike project, and was to remain there until the work was completed and then taken elsewhere. The equipment and machinery was moved from place to place as the work on section 3 of the Turnpike progressed. When plaintiff completes a contract, the equipment and machinery used are either returned to Bogota for storage or repairs or, if no repairs are necessary and there is a new job available, are transported to the new job location. The target date for completion of the job on the entire 21.7 mile length of section 3 was November 1, 1951, a total of sixteen months on the entire job.

Plaintiff filed a declaratory judgment action against the Borough of Bogota and the Townships of Westampton and Mount Laurel. All of plaintiff's equipment and machinery had regularly been assessed and taxed by the Borough of Bogota. The townships of Westampton and Mount Laurel also assessed plaintiff's equipment and machinery. The New Jersey statute provided that the tax on all tangible personal property shall be assessed in and for the taxing district where the property is found. In its suit plaintiff was concerned not only with the conflicting claims of the defendant municipalities to tax its equipment and machinery, but also with the probability of other taxing districts claiming the right to tax equipment and machinery used on the Turnpike project.

The court determined that only Bogota had the right to assess tangible personal property tax, finding that the permanent situs of plaintiff's property for taxation purposes

remained in Bogota, the home and base of plaintiff's operations. The court found that the presence of plaintiff's property in defendant townships for construction work was temporary in every sense of the word, and such part of plaintiff's equipment and machinery as happened to be in either township on the assessment date did not acquire a permanency of tax situs though visibly present there. Thus there was no justification for assessment of plaintiff's property by defendant townships.

One township argued that because plaintiff's contracts with the Turnpike Authority, signed early in 1950, had October 1, 1951, as their completion date, the property in question acquired a tax situs in the township. The court ruled that there is no evidence to support such conclusion stating:

“The contracts for section 3 of the Turnpike covered work to be done on a 21.7-mile stretch running from Allentown to Woodbury and traversing Mercer, Burlington and Camden Counties. Road-building is necessarily a progressive operation. First comes the rough work — excavating, filling and grading. Next comes the laying of the foundation and then the application of the paving surface, followed by smoothing. Culverts, bridges and similar structures must be built where necessary. Equipment and machinery suitable for one task would not be suitable for the next stage of construction. It must be obvious, therefore, that plaintiff's equipment and machinery were not set down in Westampton and Mount Laurel Townships in May, 1950, there to remain for the entire period of the contract. The tractors, loaders, trucks and other units moved the length of the Turnpike section as the work of road and bridge-building progressed. No attempt was made on behalf of Mount Laurel Township to show that the identical equipment and machinery were present in that township throughout the entire period or that even one unit remained continually on the job there. The presence of plaintiff's

property in the two townships was temporary in every sense of the word; such part of plaintiff's equipment and machinery as happened to be in either township on October 1, 1950, did not acquire a permanency of tax situs though visibly present there. The permanent situs of plaintiff's property for taxation purposes remained in Bogota, Bergen County, the "home" and base of plaintiff's operations."

Ace Construction Co. v. Board of Equalization of Douglas County, 98 N.W.2d 376

(S. Ct. Neb. 1959), involved the situation where a construction company owned heavy equipment located in and used for construction in states other than the company's domiciliary state. The equipment was held to have its situs at the domicile of the owner because the equipment was being constantly moved and only temporarily located outside of the domiciliary state; hence it never acquired an actual situs outside of the location of the corporate headquarters.

The presence of Berra's construction equipment in Jefferson County is the same as the construction equipment in Sheffield, Brewster, and Ace. Berra's equipment had only a temporary and not a permanent presence in Jefferson County, and the permanent situs of the equipment was not in Jefferson County. Respondent's evidence seeking to justify his taxation of Berra's equipment places the most emphasis on the fact that Highway 21 was a long-term project. However, under the principles espoused in Buchanan County, the duration of the presence of personal property does not matter if the presence is merely temporary. Applying these principles to equipment on construction sites, the courts in Sheffield, Brewster, and Ace found only a temporary presence where the equipment is brought to the taxing jurisdiction for

the purpose of working on a job site for the time needed, and then removed.

Mr. Boynton based his inventory on equipment on job sites throughout 2000 and 2001, but he cannot state how long each item was on the job site listed in his inventory. Having observed the “constant presence” of Berra’s equipment on job sites before and after January 1, Mr. Boynton concluded that Berra’s equipment had become a “permanent fixture,” and hence “situated” in Jefferson County. Mr. Boynton, however, could not state a timeline as to how long a specific piece of Berra’s equipment has to remain on a job, nor does his office have any standard, guideline, rule or policy to determine the length of time a specific piece of equipment must be on a job site before it becomes situated in Jefferson County. To adopt Respondent’s viewpoint that equipment on a lengthy project has become a “permanent fixture,” subjects every contractor working on projects in multiple Missouri counties to the subjective judgment of county assessors as to the length of time equipment on a project (which Mr. Boynton acknowledges to come and go as the work progresses) becomes a “permanent fixture” and hence situated in his county. Such a result would undoubtedly result in inconsistent assessments and multiple taxation.

Section 137.095 requires a corporate taxpayer to declare its property in the county in which it is situated on January first. If Respondent’s approach of considering the constant presence of some equipment on long term projects throughout the length of the projects to be thereby situated in Jefferson County, it matters not what particular equipment a taxpayer declares on January first. Respondent’s approach does not comport with Section 137.095, and places Berra, as well as every other contractor bringing equipment into Jefferson County,

subject to being second guessed as to whether and which of his equipment will be taxed.

Mr. Boynton's opinion that Berra's equipment was situated in Jefferson County was based upon the length of the projects upon which he deemed Berra's equipment to have a constant presence. Section 137.095 is directed to tangible personal property situated in the county, and not to construction projects situated in the county. Aside from disregarding the law, his opinion is not supported by the length of time each piece was actually worked on Jefferson County projects. Three of the four projects in Berra Exhibit B (Arrow Ridge, Romaine Bluffs and Seckman Lakes) were subdivision sewer projects, none of which, according to Berra Exhibit M, had any piece on the project longer than 49 calendar days or 22 working days spanning January 1, 2001, which hardly could render these pieces "permanent fixtures."

On Highway 21, a long-term project repeatedly emphasized by Mr. Boynton to support his "permanent fixture" theory, Exhibits B and M listed 30 pieces of equipment. One piece, No. 419, was on the project for 167 working days spanning January 1. All other pieces had less than two months of working days on the Highway 21 project.

Irrespective of the length of time of the project, or length of time of particular equipment used on the project, the proper criteria as dictated by Buchanan County is whether the equipment had a permanent situs in Jefferson County as of January first. The factual evidence clearly establishes that Berra's equipment, whether that listed on Berra Exhibit B or on Respondent's inventory, had only a temporary presence in Jefferson County which was not the permanent situs as would enable Jefferson County to assess and tax such equipment.

B. The Commission utilized an incorrect standard of requiring Appellant to prove that its construction equipment was “continuously and habitually employed” in another county rather than the correct standard of whether Appellant’s construction equipment was “situated” in Jefferson County within the meaning of Section 137.095 RSMo. by virtue of having a permanent presence in Jefferson County, which said permanent presence was not established by the evidence before the Commission.

The sole issue in this case is whether Berra’s construction equipment was taxable by Jefferson County by virtue of it being “situated” in that county as that term is used in Section 137.095 RSMo. In its Decision and Order the Commission held (II LF 381-832):

“... In our order dated July 9, 2002, we said: *“The parties are advised to present factual evidence about the personal property that will inform this Commission in rendering a decision about where the property was legally “situated” on the tax day...”* In order to prevail, Complainant needed to demonstrate that the property in question was “continuously and habitually employed” or located in a county other than Jefferson County. Complainant was uniquely qualified to demonstrate that the subject property was not located in Jefferson County, but has failed to present evidence which would tend to demonstrate that said equipment was located or “continuously and habitually employed” in any other county.”

The Commission erroneously utilized a legally incorrect standard of requiring Berra to prove that its equipment was “continuously or habitually employed” in another county because the correct standard is set out in Buchanan County v. State Tax Commission, 407 S.W.2d 910 (Mo. 1966) which provides clear and unequivocal directions that the Commission must determine whether on January 1, the permanent situs of Berra’s equipment was in Jefferson

County. To decide this issue in favor of Respondent, Buchanan County requires a finding that the property must have more than a temporary presence in Jefferson County, and that such presence must be more or less permanent.

Rather than making a determination whether Berra's equipment had a temporary or permanent presence in Jefferson County under the directions provided in Buchanan County, the Hearing Officer instead pulled the "continuously and habitually employed" phrase from the Missouri Supreme Court's decision in BiGo Markets, Inc. v. Morton, 843 S.W.2d 916 (Mo. 1992). In BiGo the question involved principles of interstate commerce and due process as to which state had the power to tax and whether apportionment was required as between taxing states. BiGo followed United States Supreme Court decisions holding that the domiciliary state retains the power to tax property not within the state when the property does not have a physical situs elsewhere because the property would otherwise escape taxation altogether. The BiGo court explained that if the property has insufficient contacts with any other state to establish a tax situs, it is appropriate to assume the domicile is the only state affording the opportunities, benefits, or protection which due process demands. When personal property has acquired a tax situs elsewhere, the domicile loses its jurisdiction to tax unless the domicile can establish the property is deriving substantial "opportunities, benefits, and protections" from the state by "habitual or continuous use" within the state. *Id.* 919-920.

The above rationale in BiGo has no application to the issue in the present case which does not involve principles of due process, interstate commerce and apportionment between states. Missouri has no statutory provision for apportionment as between counties, but rather

Section 137.095 requires taxation in the county where the property is “situated.” Buchanan County holds that property is situated where it has a permanent presence and not where it may derive benefits or protection by its habitual or continuous use within a county. Therefore, the Commission’s Decision was erroneous because it was based upon an inapplicable standard which required Berra to prove that its equipment was habitually and continuously employed in another county rather than deciding whether Berra’s equipment had a permanent presence in Jefferson County on tax day.

Aside from not being authorized by Section 137.095 RSMo., the “habitually and continuously employed” standard used by the Commission simply does not work with respect to intrastate taxation of construction equipment such as that equipment used by Berra in multi-county projects throughout the course of a year because the equipment is not habitually and continuously employed in any one county. In such instance, the taxable situs of the equipment remains in St. Louis County which is Berra’s domiciliary county and which provides as much, if not more, opportunities, benefits and protections as Jefferson County or any other county in which the equipment is utilized to work on a construction project.

Berra sustained its burden by presenting ample evidence establishing that the presence of its equipment in Jefferson County was temporary in every sense of the word. The evidence of both Berra and Respondent established that the equipment was brought to Jefferson County for the sole purpose of working on job sites for the time needed, then removed.

Even if the “continuous and habitual use” standard is to be employed, the evidence clearly indicates that Berra’s equipment was not continuously and habitually used in Jefferson

County, or in any other county because the equipment was constantly being moved from project to project as needed. Three of the four projects in Berra Exhibit B (Arrow Ridge, Romaine Bluffs and Seckman Lakes) were subdivision sewer projects, none of which, according to Berra Exhibit M, had any piece on the job longer than 49 calendar days or 22 working days spanning January 1, 2001. On Highway 21, Exhibits B and M listed 30 pieces of equipment. One piece, No 419, was on the job for 167 working days spanning January 1. All other pieces had less than two months of working days on the Highway 21 job. The average number of calendar days for all pieces spanning January 1 was 67; whereas BiGo involved one airplane which was hangered in Missouri for 255 out of 309 days. Of more significance, it could be understood that regularly keeping an airplane in Missouri under the circumstances in BiGo would be sufficient to find that it was continuously or habitually used in Missouri. On the other hand, the constant movement of equipment from one county to another for the sole purpose of working on projects only for the time needed can hardly be deemed to constitute continuous and habitual use in the county in which the equipment happened to be physically located on tax day.

The Commission's Decision (II LF 381) suggests that Berra's argument was focused upon where its equipment was "based."³ To the contrary, Berra's argument has always focused on where its equipment was "situated" under the principles espoused in Buchanan County. Berra's evidence clearly established that its equipment had only a temporary

³ "Based" as defined in Section 137.095.2 applies only to motor vehicles of a regulated motor carrier and has no application to construction equipment.

presence in Jefferson County. Berra's equipment worked on 77 construction projects in seven Missouri counties in 2001. Of these 77 projects, 11 were highway projects in six counties, only one of which (Highway 21) was in Jefferson County. The other 66 projects were sewer, grading and water main projects, of which 50 were located in St. Louis County, 11 in St. Charles County and 5 in Jefferson County. Using the rationale of the Commission's decision, the other counties could make the same claim of continual and habitual employment exposing Berra to multiple assessments with the resulting task of having to prove the equipment was continually and habitually employed elsewhere.

The only contact Berra's equipment had with Jefferson County was that it happened to be physically located in that county on January 1, 2001; however, Buchanan County indicates that where property is physically located is not the same as where it is situated. Berra's equipment had no more contact with or received any more protection from Jefferson County than it did from any of the other counties in which it was located in 2001. The Commission held in its Decision (II LF 381) that:

“... There is no question in our minds that Complainant anticipates that Jefferson County will provide police protection for its heavy equipment that it has seen fit to park within the confines of the county. And, to the extent that Jefferson County provides continuous and habitual police protection for the benefit of Complainant, the county is entitled to levy a tax upon the property located in said county.”

Again, the Commission has confused interstate commerce cases which hold that such property will be taxed where it has a tax situs; i.e., any state in which it is afforded the opportunities, benefits and protections of the taxing state and in which it was habitually and continuously used

during the year (required by the Due Process Clause of the federal constitution). Such interstate commerce property may have a tax situs in more than one state. Each state in which it has a tax situs is allowed to tax the property so long as it does so on a reasonably apportioned basis (required by the Interstate Commerce Clause), Beelman Truck Co. v. Ste. Genevieve County, 861 S.W.2d 557, 558 (Mo.banc 1993).

In addition, there is no evidence in the record before the Commission as to what police protection, if any, Berra enjoyed in Jefferson County. At best, any police protection Berra's equipment enjoyed while it was physically present in Jefferson County was merely incidental to its temporary presence in the county.

Section 137.095 is directed only to real and tangible personal property of corporations operating in the state. The legislature clearly contemplated that a corporation may have business operations requiring fixed locations of its personal property in multiple taxing jurisdictions within the state, at which such locations the property permanently remains. In such instances, it is perfectly logical to permit the taxation of such property at these permanent locations for indeed the property does have a permanent situs at such locations. On the other hand, the legislature did not intend that property having only a temporary presence in a county to be situated in that county for purposes of taxation. Berra's construction equipment is mobile by its very nature and purpose for its use. It comes and goes as it is needed and even when it is being used on a particular jobsite, it is in motion. It is brought to a job site to build a road or install a sewer line, after which it leaves the site. In short, it has no reason to be at any particular location other than for the limited time and purpose to accomplish the task at hand.

Thus, it can hardly be said that such equipment, used for such purposes, acquires a permanent tax situs at whatever job site it happens to be physically located on January first of any given year.

CONCLUSION

For the reasons stated herein, the Commission should reverse the decision of the State Tax Commission and hold that Respondent's assessment of personal property taxes to Complainant for 2001 be set aside and held for naught.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE WITH
MISSOURI SUPREME COURT RULE 84.06(b) AND RULE 84.06(g)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Word Perfect 10 by which it was prepared, (Word being unavailable), contains 8,202 words, exclusive of the cover, this Certificate of Compliance, the signature block and the Appendix.

The undersigned further certifies that the diskette filed herewith containing the Appellant's Brief in electronic form complies with Missouri Supreme Court Rule 84.06(g) because it has been scanned for viruses and is virus-free.

APPENDIX

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